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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-3151

HEAVEN HILL DISTILLERIES, INC.,
Appellant,

vs.

JOSEPH NOVAK, LIQUOR CONTROL COMMISSIONER OF MINNESOTA,
Appellee,

and

OLD PEORIA COMPANY, INC.,
Appellant,

vs.

JOSEPH NOVAK, LIQUOR CONTROL COMMISSIONER OF MINNESOTA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

COMBINED JURISDICTIONAL STATEMENT FOR APPELLANTS HEAVEN HILL DISTILLERIES, INC. AND OLD PEORIA COMPANY, INC.

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IN THE

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October Term, 1975

No. 75—

HEAVEN HILL DISTILLERIES, INC.,
Appellant,

vs.

JOSEPH NOVAK, LIQUOR CONTROL COMMISSIONER OF MINNESOTA,
Appellee,

and

OLD PEORIA COMPANY, INC.,
Appellant,

vs.

JOSEPH NOVAK, LIQUOR CONTROL COMMISSIONER OF MINNESOTA,
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ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

COMBINED JURISDICTIONAL STATEMENT FOR APPELLANTS HEAVEN HILL DISTILLERIES, INC. AND OLD PEORIA COMPANY, INC.

JURISDICTIONAL STATEMENT

Appellants Heaven Hill Distilleries, Inc. (Heaven Hill) and Old Peoria Company, Inc. (Old Peoria) appeal from the judgment of the Minnesota Supreme Court entered on June 3, 1975 affirming the order and decision of the District Court of Ramsey County, Minnesota, which sustained the constitutionality of Minn. Stat. §340.114 enacted May 24, 1973, as part of Minnesota Laws 1973, Chapter 664 (herein the challenged statute is sometimes referred to as C. 664, §2), and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

I. OPINIONS BELOW

(References to documents incorporated in Appellant Griggs, Cooper & Co., Inc. Appendix and Jurisdictional Statement (a companion appeal) will be to "G. C. App.")

The first opinion of the Minnesota Supreme Court in these proceedings was rendered on April 4, 1975 (G. C. App. A, pp. A-1-A-26). Said first opinion was withdrawn by the Minnesota Supreme Court on May 2, 1975, and on that date a substituted opinion was rendered by that court (G. C. App. B, pp. A-26 - A-51). Neither opinion has as yet been officially reported.

Findings of Fact, Conclusions of Law and Order for Judgment and Memorandum were entered by the Ramsey County Minnesota District Court on December 26, 1973 (G. C. App. C, pp. A-52 - A-67) and are not officially reported.

II. JURISDICTION

This action was brought by appellants to enjoin the enforcement of a state statute, Laws 1973, C. 664 (Minn. Stat. §340.114), as unconstitutional under the United States Constitution. Judgment of the Supreme Court of Minnesota upholding the statute was entered on June 3, 1975, and at the same time, the Minnesota Supreme Court denied petitions for rehearing and petitions to continue a stay of the statute pending determination of the appeal (G.C. App. D, pp. A-68 - A-69). Notice of appeal was filed in that Court on June 3, 1975, by appellants herein and others (G.C. App. F, pp. A-71 - A-72). The jurisdiction of this Court to review the judgment of the Minnesota Supreme Court by direct appeal is conferred by Title 28, United States Code, Section 1257(2).

III. STATUTES INVOLVED

The principal statute involved in this litigation, Minn. Stat. §340.114, was enacted on May 24, 1973 by the Minnesota Legislature as part of Minnesota Laws 1973, Chapter 664. That statute provides:

> Minnesota Statutes Annotated—§340.114—Chapter 664, Section 2
>
> *340.114 Unlawful discrimination prohibited*
>
> Subdivision 1. All licensed importers shall offer for sale on an equal basis to all licensed wholesalers and manufacturers all intoxicating liquor brought into the state of Minnesota.
>
> Subd. 2. Without limiting subdivision 1, the following shall be deemed failures to offer intoxicating liquor for sale on an equal basis and are unlawful:

(a) A refusal to sell any intoxicating liquor to a wholesaler or manufacturer, which is offered for sale to any other wholesaler or manufacturer, except when a wholesaler or manufacturer is in arrears on payments for past purchases from the importer who refuses to sell.

(o) A sale of any intoxicating liquor to any wholesaler or manufacturer at a price different from that offered to any other wholesaler or manufacturer, exclusive of shipping costs, except that quantity discounts based upon actual cost savings may be uniformly offered to all wholesalers and manufacturers.

(c) A sale of any intoxicating liquor to any wholesaler or manufacturer on terms of purchase different from those offered any other wholesaler or manufacturer, except that when the importer reasonably believes that a wholesaler or manufacturer will be unable to comply with the existing terms of credit, then other terms may be employed, including denial of credit.

(d) Any discrimination among wholesalers and manufacturers in satisfying their respective demands for any intoxicating liquor.

(e) A sale conditioned upon an agreement which restricts the wholesaler or manufacturer with respect to customers, area for distribution, or resale price, or which otherwise restrains the wholesaler or manufacturer from competing in trade and commerce.

(f) For purposes of this subdivision and subdivision 1 only, the term "intoxicating liquor" shall not include "pop wines" as the same are defined by regulation of the commissioner.

Subd. 3. No licensed importer or manufacturer shall offer or sell to any licensed wholesaler any intoxicating

liquor at a bottle or case price which is higher than the lowest price at which such item of liquor is contemporaneously being sold by such importer or manufacturer to any wholesaler anywhere in any other state of the United States or in the District of Columbia or to any state or state agency which owns and operates retail liquor stores.

In determining the lowest price for which any item of liquor is being sold in any other state or in the District of Columbia, or to any state or state agency which owns and operates retail liquor stores, appropriate reductions shall be made to reflect all discounts, rebates, free goods, allowances and other inducements of any kind whatsoever offered or given to any such wholesaler, state, or state agency purchasing such item in such other state or in the District of Columbia; provided that nothing contained herein shall prevent differentials in price which make only due allowance for differences in state taxes and fees, and in the actual cost of delivery. As used in this subdivision, the term "state taxes or fees" shall mean the excise taxes imposed or the fees required by any state or the District of Columbia based upon a gallon of liquor.

Subd. 4. Nothing in this section shall apply to any wines or malt beverages regardless of alcoholic content.

The second statute involved in this litigation is Minn. Stat. §340.19 (1973). This statute prescribes the civil and criminal penalties for violations of the provisions of the Intoxicating Liquor Act, including Minn. Stat. §340.114, in part as follows:

340.19 REMOVAL OF OFFICERS; LICENSES REVOKED; BONDS FORFEITED; VIOLATIONS.

* * *

(2) When any licensee shall wilfully violate the provisions of the intoxicating liquor act his license shall be immediately revoked and his bond forfeited, and no license of any class shall for a term of five years thereafter be issued to the same person or to any person who at the time of the violation owns any interest, whether as holder of more than five percent of the capital stock of a corporation licensee, as partner, or otherwise, in the premises or in the business conducted thereon, or to any corporation, partnership, association, enterprise, business, or firm in which any such person is in any manner interested.

* * *

(4) Whoever, in violation of the provisions of the intoxicating liquor act, shall transport or import into the state liquor for the purposes of sale shall be guilty of a gross misdemeanor.

* * *

(6) Whoever shall violate any of the provisions of the intoxicating liquor act as to sale, licensing, or any of the regulatory provisions pertaining thereto, as herein provided, shall be guilty of a misdemeanor.

(7) Whoever refuses or neglects to obey any lawful direction of the liquor control commissioner, or his deputy or any of his assistants . . . shall be guilty of a gross misdemeanor.

IV. QUESTIONS PRESENTED

1. Is Laws 1973, C. 664, §2 an arbitrary and unreasonable exercise of the state's police power in violation of procedural due process under the Constitution of the United States because it is overbroad in providing for a conclusive presumption that every refusal to sell by a licensed distiller is a denial of equal treatment (except for arrearage in payment for past purchases) and a crime, when it appears that there are many other instances where such refusal to sell would be neither predatory nor monopolistic and when such licensed distiller would be deprived of the right and opportunity to defend his refusal to sell on that basis?

2. Where, despite existence of vigorous interbrand competition between licensed distillers and wholesalers in sales of particular brands of liquor to retailers and consumers (G.C. App. B, p. A-35) other and equivalent brands of which were readily available in the Minnesota market, the Minnesota Legislature enacted §340.114, a non-temperance statute ostensibly for the purpose of abolishing sole or exclusive distributorships of any brand of liquor and compelling intrabrand competition in all such brands by requiring all such licensed distillers to sell their brands on an equal basis to all licensed Minnesota wholesalers, could the Minnesota Legislature implement said equal basis provision by creating a conclusive and irrebuttable presumption (except for arrearage in payment for past purchases) that every refusal by any such distiller to sell to a wholesaler liquor which is offered for sale to any other wholesaler, is deemed a failure to offer liquor for sale on an equal basis and is unlawful and was such a provision an unconstitutional denial of procedural due process under the Constitution of the United States?

3. Could the Minnesota Legislature consistent with the procedural due process requirement of the Constitution of the United States employ a conclusive irrebuttable presumption that every refusal to sell (except for arrearage reasons) by a licensed distiller to a licensed Minnesota wholesaler is to be deemed to be a failure to offer such liquor for sale on an equal basis to all wholesalers and thereby render such distiller subject to criminal and civil penalties including forfeiture of license, and thereby totally deprive (except for arrearage reasons) licensed distillers of their right of confinement of sale of their merchandise to dealers selected by them?

4. Does C. 664, §2 represent an arbitrary and unreasonable exercise of the state's police power in violation of due process under the Constitution of the United States because it unconstitutionally deprives appellant wholesaler of its liberty and property rights?

5. Does C. 664, §2, violate appellants' rights to equal protection under the United States Constitution in arbitrarily and discriminatorily exempting pop wines, wines, and malt beverages from the coverage of the new Act?

6. Does C. 664, §2, as construed by the Minnesota Supreme Court in its June 2, 1975 opinion, violate appellants' due process and equal protection rights under the Constitution of the United States in that said Court, while recognizing that the Minnesota Legislature has created an all-inclusive and irrebuttable presumption of law violation in respect of every refusal by a licensed distiller to sell to a licensed wholesaler as provided in said statute (except for arrearage reasons), nevertheless attempted to sustain the Act's constitutionality on the basis of future administrative action of a Liquor Control Commission to adjudicate exceptions to such conclusive presumption on a case-by-case basis, thereby establishing a

procedure which is an unlawful delegation of legislative authority to an administrative agency and interjecting an unconstitutional vagueness into the Act?

V. STATEMENT OF THE CASE

A. Procedural History.

This is a direct appeal from the judgment of the Supreme Court of Minnesota entered pursuant to an opinion of that Court dated May 2, 1975 in which it held that Section 340.114 does not violate the provisions of the United States and Minnesota Constitutions. (G.C. App. B, *infra*, pp. A-26 - A-51) The Minnesota Supreme Court's opinion of May 2, 1975 followed upon protracted state court proceedings.

In June 1973 Federal Distillers, Inc. (Federal), Mr. Boston Distiller Corporation (Boston), and Johnson Brothers Wholesale Liquor Company (Johnson), pursuant to Minn. Stat. §555.01 *et seq*, brought a declaratory judgment action in Ramsey County District Court against Joseph Novak, the Minnesota Liquor Control Commissioner, and the State of Minnesota requesting that Section 340.114 be declared unconstitutional. Ed. Phillips & Sons Co. (Phillips) and Griggs Cooper & Co., Inc. (Griggs) intervened as plaintiffs in that action, and Raymond Distributing Company (Raymond) intervened as a defendant. Three separate similar actions were brought against Commissioner Novak by Heaven Hill Distillers, Inc., (Heaven Hill) Old Peoria, Inc., (Old Peoria), and National Distillers & Chemical Corporation (National Distillers).

Appellants, Heaven Hill and Old Peoria, and the other plaintiffs and intervenors, after commencing their actions in June and July challenging the constitutionality of the amendments to the liquor laws enacted by the Minnesota Legislature, Laws

1973, C. 664, then filed motions for temporary injunctive relief which were set for hearing in late July 1973. By these motions, appellants and other plaintiffs sought to prevent application of the 1973 Liquor Act amendments to the period after the amendments were designed to become effective—namely, on August 1, 1973.

The matter came before the Honorable Stephen L. Maxwell, one of the judges of the Ramsey County District Court, on July 17, 1973, pursuant to the motions for temporary injunctive relief. In lieu of deciding the issue of temporary injunctive relief (and making findings and conclusions thereon), the Court entered an Order which was fundamentally designed to expedite final disposition of the cases. The Order of the Court dated July 17, 1973, thus contained certain findings, including the following: (a) that because of the substantial and complex questions of fact and law it was not feasible for the parties to complete discovery and trial, and for the Court to render a decision, prior to C. 664's effective date of August 1, 1973; (b) that because of the aforesaid time constraints, it was appropriate to preserve the *status quo* among the parties as to one section (§2) of C. 664 for a period of time, and no enforcement of C. 664 or promulgation of regulations pertaining to § 2 should occur; (c) that such Order in no way constituted a determination by the Court on the merits of any issue, claim or allegation; and (d) that discovery and trial should be expedited and advanced. Accordingly, the Court ordered, *inter alia*, that the three actions then pending were to be consolidated for discovery and trial, and that discovery was to be completed by August 31, 1973, and that trial was to commence on September 4, 1973, or as soon thereafter as possible.

This matter was tried in the District Court of Ramsey County, before the Honorable Harold W. Schultz, without a jury.

The Trial Court found in favor of appellees, determining that Ch. 664, §2, was in all respects a proper exercise of police power of the state and did not operate to deprive any person of due process or equal protection rights. (Conclusions of Law, I-IV, G.C. App. C, p. A-63) The Trial Court determined that C. 664 was in all respects constitutional, valid and enforceable. (Conclusions of Law, VIII, G.C. App. C, p. A-64)

The appellants and other plaintiffs and intervenors appealed from the order denying their motion for amended findings, or in the alternative for a new trial. The Minnesota Supreme Court, on motion of appellants and other plaintiffs-intervenors, continued in effect the order to preserve the *status quo* pending appeal.

On April 4, 1975 the Minnesota Supreme Court issued its first opinion in this matter. One Justice dissented. Petitions for rehearing were timely filed by appellants herein (among others), and in response thereto on May 2, 1975 the Minnesota Supreme Court withdrew its April 4 opinion and substituted its opinion dated May 2, 1975.

Timely petitions for rehearing asserting errors reflected in the May 2, 1975 opinion were filed. These petitions asserted, among other things, that Section 340.114 as construed is void for vagueness, that the Minnesota Supreme Court delegated or sanctioned an unlawful delegation of legislative authority to the Minnesota Liquor Control Commissioner, and that in an attempt to salvage the statute the Minnesota Supreme Court legislated undefined exceptions into the statute in excess of authority. These petitions were denied by the Minnesota Supreme Court without comment on June 3, 1975. The instant appeals to this Court followed.

Enforcement of Section 340.114 was stayed while proceedings were pending in the Minnesota state courts. The Minne-

sota Supreme Court, by its order dated June 3, 1975, refused to continue the stay pending a determination of this appeal. A stay was denied by this Court on June 16, 1975.

B. Description of Appellants and Other Parties.

Appellants and other plaintiffs and intervenors originally in this action fell generally into two groups: (a) foreign corporations (presently licensed importers) which manufacture, rectify, blend, bottle and label liquor outside the State of Minnesota for sale to wholesale distributors in Minnesota, and (b) Minnesota corporations which sell liquor at wholesale in the State of Minnesota (licensed wholesalers).

The first group (licensed importers) consists of:

(1) Heaven Hill Distilleries, Inc., appellant herein, a Kentucky corporation ("Heaven Hill"). Heaven Hill sells bulk whiskey to a Minnesota wholesaler (Old Peoria Company, Inc.) through Heaven Hill Company (an independent partnership) and then bottles the whiskey at the request of the owner of the bulk whiskey under brands owned by Heaven Hill.

(2) Federal Distillers, Inc., a Massachusetts corporation ("Federal"). Federal sells distilled spirits to Johnson Brothers Wholesale Liquor Company ("Johnson") in Cambridge, Massachusetts. Much of this product is bottled and labeled under brand labels owned by and registered to Johnson. Other products are bottled and labeled under brands owned by and registered to Federal. The composition of the individual product is not necessarily unique to Johnson. Johnson is the only Minnesota wholesaler to which Federal sells any intoxicating liquor.

(3) Mr. Boston Distiller Corporation, a Massachusetts corporation ("Mr. Boston"). Mr. Boston bottles distilled spirits under brands owned by Johnson and other brands owned

by Mr. Boston. Mr. Boston sells such brands only to Johnson in Minnesota.

(4) National Distillers & Chemical Corporation, a Virginia corporation ("National"). National sells branded distilled spirits and wines only to Ed. Phillips & Sons Co. in Minnesota.

The second group (presently licensed wholesalers) consists of:

(5) Old Peoria Company, Inc. ("Old Peoria"), appellant herein. Old Peoria distributes both distilled spirits and wine in Minnesota.

(6) Griggs, Cooper & Company, Inc. ("Griggs, Cooper"). Griggs, Cooper distributes both distilled spirits and wine in Minnesota. (Findings of Fact 4, G.C. App. C, p. A-57)

(7) Johnson Brothers Wholesale Liquor Company ("Johnson"). Johnson deals in distilled spirits and wine and also deals in wine through two wholly-owned subsidiaries. Johnson has acquired and owns private brand labels under which Federal and Mr. Boston bottle distilled spirits for Johnson. Johnson's labels are registered under trademark law with the Minnesota Liquor Control Commission and with the Alcohol and Tobacco Division of the U. S. Treasury Department.

(8) Ed. Phillips & Sons Co. ("Phillips"). Like all wholesalers, Phillips is a Minnesota corporation licensed by the State of Minnesota as a manufacturer, wholesaler and importer of intoxicating liquor. (T. 15, 62) In addition to its wholesaling activities, Phillips imports bulk whiskey into Minnesota which it then rectifies, blends, bottles and labels with brand labels which are owned by and registered to Phillips ("Phillips brands"). Phillps sells these branded products to retailers in Minnesota and to wholesalers in other states. Phillips also purchases liquor from suppliers outside of Minne-

sota and resells that liquor at wholesale in Minnesota as the sole wholesale outlet. (Findings of Fact 5, G.C. App. C, p. A-57)

The originally named defendants are the State of Minnesota and Joseph V. Novak, Minnesota Liquor Control Commissioner. Certain plaintiffs named only Commissioner Novak as defendant. (Findings of Fact 6, G.C. App. C, p. A-57)

Raymond Distributing Company, Inc. ("Raymond") intervened as a defendant in the original action. Raymond is a recently organized Minnesota wholesaler, licensed in May, 1973, and has unsuccessfully attempted to purchase certain established brands of intoxicating beverages from some suppliers. Raymond could apparently purchase some unknown or lesser established brands of intoxicating beverages, but for certain reasons has not commenced business. (Findings of Fact 7, G.C. App. C, p. A-57).

No wholesaler has any contract or agreement, oral or written, which provides the wholesaler with any continuing right to purchase any brand of liquor. No wholesaler has any agreement that it is or shall be the only distributor of any brand of liquor in Minnesota. However, a wholesaler expects to continue to be the sole distributor of a particular brand if his performance, record of sales, and good credit are maintained. (Findings of Fact 8, G.C. App. C, pp. A-57 - A-58)

All of the foreign corporations which supply the wholesalers are licensed by the Minnesota Liquor Control Commissioner as importers pursuant to Minn. Stat. § 340.113 and regularly ship products into Minnesota. (Findings of Fact 9, G.C. App. C, p. A-58)

There are ten persons or entities (excluding intervenor Raymond) currently licensed to manufacture, wholesale and import intoxicating liquors in Minnesota pursuant to Minn.

Stat. § 340.11, subd. 2, including Johnson, Phillips, Old Peoria and Griggs, Cooper. (Findings of Fact 11, G.C. App. C, p. A-58)

There are thirteen persons or entities licensed to import and wholesale wines (but not distilled spirits) in Minnesota. (Findings of Fact 12, G.C. App. C, p. A-58)

There are approximately 210 persons or entities licensed to import and wholesale malt beverages containing more than 3.2% of alcohol by weight in Minnesota. (Findings of Fact 13, G.C. App. C, p. A-58)

There are approximately 150 persons or entities holding licenses to ship intoxicating liquor into Minnesota pursuant to Minn. Stat. § 340.113, including Federal, Mr. Boston Heaven Hill, and National. (Findings of Fact 14, G.C. App. C, p. A-58)

The most striking feature of the marketing system of distilled spirits is the large number of brands registered and sold in Minnesota. There are 1,113 separate brands registered within Minnesota. Phillips Exh. 2. Many of these are nationally known brands. Others are local brands, known only to the Minnesota market. Total brands registered in the United States are in excess of 10,000, and the 1,113 registered in Minnesota represent vigorous competition and wide consumer selection. (T. 507)

C. The General Nature of the Liquor Industry in Minnesota.

The distribution system for distilled spirits in Minnesota is three tiered: Out-of-state distillers sell spirits to Minnesota wholesalers, who in turn sell to retailers. Out-of-state distillers acquire importer's licenses from the State, and register with the State brands of which they are the owner or assignee. They

in turn sell to wholesalers within the State. These wholesalers are licensed by the State, and under their wholesale license may buy, manufacture or import distilled spirits into the State. (T. 15, 47) There is no limit on the number of importers or wholesalers the State may license.

The wholesaler generally buys bottled spirits from the licensed importer F.O.B. importer's plant, outside the State of Minnesota, and thus takes title to the distilled spirits outside the State. (T. 276-77) The wholesaler then ships the bottled spirits into the State and, in turn, sells it to licensed retailers, whose numbers are limited by state regulation. (Minn. Stat. § 340.13)

Most licensed importers, in supplying distilled spirits to wholesalers, have determined over a period of time that the most effective means of promoting their brands is through selecting one licensed wholesaler within the State to serve as sole distributor for their brands. (T. 511-513) Where one wholesaler distributes a brand, the wholesaler has found it to be good business practice to promote that brand within the State, through advertising, sales contests, and promotion efforts aimed at retailers. (Findings of Fact 17 and 18, G.C. App. C, p. A-59) Exercising their right to oversee sales of their products, licensed importers thus came to use sole distributors almost exclusively. (Findings of Fact 15, G.C. App. C, p. A-58) This marketing and distribution system has been in operation for at least 35 years in Minnesota and represents considerable investment of time and money on the part of the distillers, wholesalers, and retailers. (T. 277-279)

In 1969, the Minnesota Legislature enacted Laws 1969, C. 1119, § 5, Minn. Stat. § 340.984, which forbade agreements between wholesalers and manufacturers prohibiting manufacturers from supplying intoxicating liquor to other whole-

salers. Despite the "protection" supposedly offered to licensed importers through this Act, licensed importers continued to choose to deal with one wholesaler. While no agreement preventing dual distributors existed, since it would be contrary to law, licensed importers continued to find that the sole distributor system was a sound business practice which most effectively promoted their brands within the State.

Licensed wholesalers of distilled spirits within the State, while not contractually bound to sole distributorships, found that this arrangement constituted sound business practice for them as well. With the financial support and backing of the importer, they would invest their own effort and money in promotion of brands they carried. (Findings of Fact 17, G.C. App. C, p. A-59) Large investment in plants, sales force, and advertising benefited both the importer and wholesaler as sales to retailers increased.

This marketing arrangement resulted ultimately in vigorous interbrand competition. (Findings of Fact 20, G.C. App. C, p. A-29) Each wholesaler promoted the brands of his importers, and equivalent brands in each category and price range vied for the retailer's and consumer's attention. Under Minn. Stat. C. 340, wholesalers were required to file price listings for all intoxicating liquor bi-weekly with the State Liquor Control Commissioner. (T. 292-296) Such filings were made without prior knowledge of other wholesalers' contemplated listings. Several days following each filing, wholesalers were given access to prices filed by other wholesalers, and after study and analysis of "deals" offered by competitors, many wholesalers filed amended price listings and "deals" to meet the competition. (T. 292-296)

In short, the marketing of distilled spirits was conducted in an atmosphere of vigorous interbrand competition on the

wholesale level (Findings of Fact 20, G.C. App. C, p. A-29), with each wholesaler cutting prices and amending his filed price listings in an attempt to meet the prices of his competitors on equivalent brands. (T. 292-296) This system made available to retailers an enormous variety of distilled spirits at competitive prices and created a consumer demand for a wide variety of brands through vigorous advertising and promotion. (T. 106, 330)

Other intoxicating liquor, i.e., wine and malt beverages, is marketed in a similar manner. The eleven wholesalers of distilled spirits, and certain wholesalers of wine, buy wine from foreign or domestic importers or manufacturers, F.O.B. point of origin, and ship it into the state. (T. 38, 82) As in the case of distilled spirits, such importers and manufacturers chose to deal with only one wholesaler within the state, having found that such an arrangement best allowed for promotion of its products. (T. 173, 471) These wholesalers, in turn, competed vigorously with one another for the retail and consumer market, promoting through advertising and pricing the brands they carry. (T. 243, 471, 595)

The demand for wines is currently expanding greatly in Minnesota and throughout the country. Consequently the wine market is not as stable and entrenched as the market for distilled spirits. (Findings of Fact 34, G.C. App. C, p. A-61)

Similarly, malt beverages are marketed through territorial wholesalers, who serve as the sole distributors for the malt beverages in the territory. (T. 173) This system, as in distilled spirits and wines, has led to vigorous competition among brands.

D. Effect of C. 664, §2.

C. 664, § 2 is a statute requiring licensed importers of distilled spirits to sell on an equal basis to all Minnesota wholesalers. A refusal to sell for reasons other than a wholesaler's being in arrears on payments for past purchases is an unlawful violation of the statute and a misdemeanor, Minn. Stat. § 340.19(6), and subjects the licensed importer to immediate revocation of his license, Minn. Stat. § 340.19(2). In addition, the statute provides that licensed importers must sell distilled spirits to Minnesota wholesalers at the lowest price at which such importer is selling the same item in any state in the United States, or at the so-called "affirmation" price. The statute specifically exempts licensed wholesalers of wines and malt beverages, regardless of alcoholic content.

E. How the Federal Question Is Presented.

Appellants herein alleged violations of their rights under the United States Constitution in their initial complaints. The District Court of Minnesota held that C. 664, § 2 did not violate rights under the Minnesota or United States Constitutions. In its Conclusions of Law, the Court held:

> II. Chapter 664 does not operate to deprive any person of life, liberty or property without due process of law contrary to any provision of the Constitution of the United States or the State of Minnesota.
>
> III. Chapter 664 does not operate in an unconstitutionally overbroad manner.
>
> IV. No classification or distinction made by Chapter 664 is shown to be improper, unreasonable or without conceivable basis, or to operate as special legislation or a denial of equal protection of the laws contrary to any pro-

vision of the Constitution of the United States or the State of Minnesota.

In its opinion of May 2, 1975, the Minnesota Supreme Court also directly addressed the federal constitutional issues presented. The Minnesota Supreme Court upheld the Conclusions of the Trial Court. It specifically found that the Fourteenth Amendment to the United States Constitution did not prohibit the legislature from dealing only with distilled spirits in this Act and exempting pop wines, wines, and malt beverages. (G.C. App. B, pp. A-42 - A-43)

The Supreme Court of Minnesota also examined the question of whether the Act created a "constitutionally impermissible conclusive presumption" (G.C. App. B, p. A-47) within the meaning of several recent United States Supreme Court cases. The Minnesota Supreme Court concluded that the statute, on its face, did not create such a constitutionally impermissible presumption. (G.C. App. B, p. A-51)

VI. THE QUESTIONS ARE SUBSTANTIAL

The central issues in this case involve the conflict between individual rights and the police power of the state.

Although a state may use its police power to promote the economic welfare of its citizens, a statute cannot violate either procedural or substantive due process rights of any citizen in order to achieve an economic goal. This case raises serious questions of violation of both procedural and substantive due process. The statute, by its overbreadth and inherent conclusive presumptions, violates the procedural due process rights of appellants and others. Further, as the statute acts to deprive appellants and others of certain basic economic

rights, it violates substantive due process rights. As construed by the Minnesota Supreme Court, it unlawfully delegates certain legislative responsibilities to an administrative agency and consequentially has been rendered so vague as to provide inadequate notice to those who may be subject to its criminal penalties.

The issues raised by this case present questions of general importance, issues which go far beyond immediate application to the distilled spirits industry. The methods and means of regulation embodied in this state represents a radical step in economic regulation which affects every sector of business and industry.

A. Preliminary Matters.

Before focusing on those issues raised by C. 664, § 2, it may be appropriate to examine certain other questions which appear to impinge upon this case: temperance and the Twenty-first Amendment to the Constitution.

1. Temperance

The first question to be cleared away concerns "temperance."

Insofar as C. 664, § 2, requires every licensed importer to fill orders from all licensed Minnesota wholesalers if such licensed importer sells to at least one Minnesota wholesaler, it is plain that the thrust of the law is not aimed at reduction in consumption of distilled spirits. The Minnesota Supreme Court said:

> This legislation obviously is not designed to promote temperance. . . (May 2, 1975 opinion, G.C. App. A, p. A-37)

Thus, the purpose of the statute clearly is economic, and the avowed intent of the legislature was to lower prices to the consumer. (G.C. App. B, p. A-36) No defense of the statute can be raised on the traditional ground that it is intended as a temperance measure, and it must be judged by the same standards as any other law affecting the economic arrangements of an industry.

2. The Twenty-first Amendment

The second question to be examined is whether the Twenty-first Amendment disposes of this case.

The State has asserted throughout this case that whatever rights or privileges may normally exist in business arrangements are inapplicable here, for any such rights or privileges must fall before the broad sweep of the State's police power over intoxicating liquors pursuant to the Twenty-first Amendment to the United States Constitution.

State police power over intoxicating liquors traditionally has been attributed to the Twenty-first Amendment. The Twenty-first Amendment reads, in part, as follows:

> The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquor, in violation of the laws thereof, is hereby prohibited.

This Court has read this provision as vesting absolute powers in the states to prohibit the importation of liquor into the state, and wide but not unlimited power to regulate the sale and use of liquor within their boundaries. *Mahoney v. Joseph Triner Corporation,* 304 U.S. 401, 58 S.Ct. 952, 92 L.Ed. 1424 (1938), represents a case dealing with the abso-

lute power of the state over importation, and in that case this Court denied an equal protection claim because of the state's broad powers over importation.

However, Supreme Court cases clearly indicate that once the importation of intoxicating liquors is allowed, the state does not have absolute or unlimited powers of regulation. Under the Twenty-first Amendment, a state may keep intoxicating liquors out of the state, but once the state allows liquor to be imported and allows it to be marketed within its borders, then the state's powers to regulate the liquor industry under its police powers is limited by virtue of other constitutional provisions.

An analogous situation was presented in *Hellenic Lines Limited v. Rhoditis*, 398 U.S. 306, 90 S.Ct. 1731, 26 L.Ed.2d 252 (1970), reh. den., 400 U.S. 856, where the Supreme Court of the United States, in footnote 5 of its opinion, stated the following:

> The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment. (At p. 1734)

The mere fact that a statute may be reasonable under the Twenty-first Amendment does not mean that it is reasonable for all purposes. It may be unreasonable under other provisions of the Federal Constitution and therefore invalid. See *Krause v. Sacramento Inn*, 479 F.2d 988, 989 (9th Cir. 1973), where the Court said:

> . . . a statute may be reasonable under the Twenty-first and unreasonable under the Fourteenth.

This Court, in *United States v. Frankfort Distilleries*, 324 U.S. 293, 65 S.Ct. 661, 89 L.Ed. 951 (1945), recognized that the power given to states under the Twenty-first Amendment was not plenary and exclusive. In *California v. LaRue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), Mr. Justice Stewart, concurring, citing *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971), stated:

> This is not to say that the Twenty-first Amendment empowers a state to act with total irrationality or invidious discrimination in controlling the distribution and dispensation of liquor within its borders. (At p. 398)

Similarly, Mr. Justice Rehnquist writing in *California v. LaRue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), recognized that the Twenty-first Amendment does not supersede all other provisions of the United States Constitution in the area of liquor regulation. Analyzing previous Supreme Court decisions dealing with the Twenty-first Amendment, he concluded:

> These decisions did not go so far as to hold or say that the Twenty-first Amendment supersedes all other provisions of the United States Constitution in the area of liquor regulations. (At p. 395)

In *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971), the court found that the fundamental due process requirements of notice and hearing under the Fourteenth Amendment must be met in a statute regulating intoxicating liquor, despite the police power of the state under the Twenty-first Amendment. The Court stated:

> We have no doubt as to the power of a state to deal with the evils [excessive drinking] described in the Act . . . [But] we agree with the District Court that . . . those requirements of procedural due process must be met. (400 U.S. 433, 436)

Similarly, the Fifth Circuit Court of Appeals in *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964), reh. denied, 330 F.2d 55 (5th Cir. 1964), stated:

> Next, we note that states do not escape the operation of the Fourteenth Amendment in dealing with intoxicating beverages by reason of the Twenty-first Amendment. Section 2 of that Amendment deals with the transportation or importation of liquors into a state or territory. Thus, although a state may, under the Twenty-first Amendment, discriminate against imports of intoxicating beverages, see State Board of Equalization of California v. Young's Mkt. Co., 299 U.S. 59, 57 S.Ct. 77, 81 L.Ed. 38 (1936), the Amendment does not confer any other powers, see Sancho v. Corona Brewing Corp., 89 F.2d 479 (1st Cir. 1973). '[T]he Twenty-first Amendment did not clothe the State's right to control the sale of liquor with any higher degree than it had over the sale of other commodities within the State.' Brown v. Jatros, 55 F.Supp. 542, 544 (E.D. Mich. 1944) (At p. 609)

See also *Parks v. Allen*, 426 F.2d 610 (5th Cir. 1970).

Decisions in other courts have reached similar conclusions. As was stated by Judge Van Dusen in *Republican College Council of Pennsylvania v. Winner*, 357 F.Supp. 739 (E.D. Pa. 1973), in holding that Pennsylvania laws prohibiting alcohol to persons under 21 was not a violation of constitutional rights:

> This is not to say that the Pennsylvania system of liquor regulation is free from all scrutiny. It must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. *San Antonio Independent School District v. Rodriguez*, 411 U.S. at 17, 93 S.C. at 1288. (At. p. 741)

Judge Van Dusen noted that "this is so despite the sweep of the Twenty-first Amendment." 357 F.Supp. 739, 741. See also *Auto City Brewing Co. v. Gruick*, 301 Mich. 320, 3 N.W.2d 290 (1942), and cases cited therein, and *Major Liquors, Inc. v. City of Omaha*, 188 Neb. 628, 198 N.W.2d 483 (1972).

The Federal District Court in Minnesota, in *United States v. Ericson*, 102 F.Supp. 376 (D. Minn. 1951), rejected an argument by the State of Minnesota that the Twenty-first Amendment gave the state exclusive power over the liquor industry. The court found that the Twenty-first Amendment affected federal power over the regulation of liquor only under the commerce clause, and had no effect on its power under a provision such as the war clause. (102 F.Supp. 376, 399)

The Supreme Court of Minnesota, likewise, has held that the Twenty-first Amendment does not override constitutional rights. In *George Benz Sons, Inc. v. Ericson*, 227 Minn. 1, 34 N.W.2d 725 (1948), the court held that a statute regulating the liquor industry was violative of equal protection rights and therefore invalid under Federal and State Constitutions. The Minnesota Supreme Court in *Benz* cites approvingly *Glicker v. Michigan Liquor Control Comm.*, 160 F.2d 96 (6th Cir. 1947), in which the Sixth Circuit Court of Appeals stated:

> The fact that the appellant is in the liquor business does

> not release the State from the restrictions on its regulatory powers referred to. (At p. 100)

The *Benz* court then quoted from *Francis v. Fitzpatrick*, 129 Conn. 619, 30 A.2d 522, 554, 145 A.L.R. 505 (1943):

> But neither the power of the state absolutely to prohibit all traffic in alcoholic liquors nor the legislative declaration that a permit constitutes a privilege and not property renders inapplicable constitutional guaranties such as that of the equal protection of the laws. (At p. 622)

C. 664, §2 applies to importers *after* they are licensed and after engaging in business in Minnesota after issuance of such license.

In short, federal and state courts, including the United States Supreme Court and the Minnesota Supreme Court, have held that the Twenty-first Amendment does not eliminate the constitutional rights and protections otherwise available to those engaged in the distribution and sale of intoxicating liquors.

B. Due Process Questions Raised by This Statute.

1. Due Process Liberty and the Right to Refuse to Deal.

Due process rights to liberty and property are inherent in the marketing arrangements between licensed importers, wholesalers, and retailers of intoxicating liquors. The most basic right implicit in the marketing arrangement is the right to refuse to deal in any manner whatever with any other person, a right which is part of the *liberty* protected by due process. In *Advance-Rumley Thresher Co., Inc. v. Jackson*, 287 U.S. 283, 53 S.Ct. 133, 77 L.Ed. 306 (1931), this Court stated:

> While that right is a part of the liberty protected by the due process clause, it is subject to such restraints as the State in the exertion of police power may put upon it. But freedom of contract is the general rule and restraint the exception. The exercise of legislative authority to bridge it can only be justified by the existence of exceptional circumstances. (At page 134)

See also *U.S. v. Colgate and Co.*, 250 U.S. 300, 39 S.Ct. 465, 468, 63 L.Ed. 992 (1919); *Ertz v. Product Exchange Co. of Minnesota*, 79 Minn. 140, 81 N.W. 737, 738 (1900). This right to freely exercise independent discretion as to the parties with whom one deals (*Osborn v. Sinclair Refining Co.*, 171 F.Supp. 37, 44 (D. Me. 1959)) "existed before the adoption of the Constitution and is guaranteed by that instrument" subject only to burdens imposed by a valid exercise of police power. *Grubel v. MacLaughlin*, 286 F.Supp. 24 (D.V.I. 1968) (opinion by Judge Maris of the Third Circuit); see also *Lincoln Dairy Co. v. Finigan*, 170 Neb. 777, 104 N.W.2d 227 (1960).

The exercise of the right to refuse to deal is no violation of anti-trust or anti-monopoly law, as this Court clearly stated in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967):

> . . . a manufacturer of a product other and equivalent brands of which are readily available in the market may select his customers, and for this purpose he may "franchise" certain dealers to whom, alone, he will sell his goods. Cf. United States v. Colgate & Co., 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919). If the restraint stops at that point—if nothing more is involved than vertical "confinement" of the manufacturer's own sales of the merchandise to selected dealers, and if competitive prod-

> ucts are readily available to others, the restriction, on these facts alone, would not violate the Sherman Act. (At p. 1864)

See also cases cited in *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke and Liquors, Ltd.*, 416 F.2d 71, 76 (9th Cir. 1969). Thus, the right to refuse to deal has not been abrogated by the Sherman Act, and is specifically protected by the Clayton Act, 15 U.S.C. § 13(a), which provides:

> . . . *and provided further*, that nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade . . .

Under these federal anti-trust laws the granting of exclusive selling rights or acceptance of such exclusive selling rights are not prohibited unless there results a "foreclosure of market alternatives." *Elder-Beerman Stores Corp. v. Federated Dept. Stores, Inc.*, 459 F.2d 138 (6th Cir. 1972).

Thus under federal anti-trust laws, (and under Minnesota anti-trust law as well), liquor manufacturers may deal exclusively with selected wholesale distributors where equivalent products are available on the market. *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke and Liquor Ltd.*, 416 F.2d 71 (9th Cir. 1969). Indeed, this Court has recognized that this is the established commercial practice in the liquor industry. *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 86 S.Ct. 1254, 1263, 16 L.Ed.2d 336 (1966).

Thus, there exists a right in the distiller-importers to refuse to deal with certain wholesalers if they so choose, a constitu-

tionally protected right to liberty, which violates no federal or state anti-trust laws.

2. Due Process Violations.

C. 664 § 2 directly affects the right to refuse to deal. The Act requires all licensed importers to offer their brands imported into the state to all wholesalers on an equal basis, and allows no refusal to sell to any wholesaler except on grounds of payment arrearages. In other words, the Act destroys the due process right of each businessman to refuse to deal. The Act in effect creates compulsory non-terminable franchises for every licensed wholesaler by totally depriving licensed importers of all right to confine distribution and sale of their product to wholesalers of *their* choice.

The Trial Court found (Findings of Fact 24, G.C. App. C, p. A-60) that the Legislature could reasonably determine that the Act would promote competition and tend to lower prices to retail liquor dealers. Assuming for the moment that these are proper objectives of the State in exercising its police power with respect to the liquor industry, the crucial question in the instant case is whether the Act is a reasonable exercise of the police power in light of those objectives.

a. *Overbreadth.* C. 664 is not a proper exercise of the State's police power because the sweep of the the statute is too broad, and it regulates conduct which is beyond the purported purposes of the statute, conduct which is protected by the due process clauses of the Federal and State Constitutions. The Act is not restricted to conduct related to competition and price reduction. Had it been so limited, it would have been less subject to the claim of constitutional invalidity. For example, the Hawaiian anti-trust statute deals directly with refusals to deal, providing:

> No person shall refuse to sell any commodity to, or buy any commodity from, any other person or persons, when the refusal is for the purpose of compelling or inducing the other person or persons to agree to or engage in acts which, if acceded to, are prohibited by [the state's anti-trust law] . . . (Hawaii Revised Statutes 1968, § 480-6)

The Minnesota statute, however, is not so worded, Instead, it infringes upon the rights of distillers to refuse to sell when the reason for such refusal may be a proper and legitimate business reason having no connection with the subject of promotion of competition or price reduction to consumers. Stated otherwise, there are legitimate, sound business reasons why a distiller would not want to enter into a relationship with a wholesaler which would give the wholesaler a non-terminable franchise to distribute the distiller's brands. There are sound, proper business reasons which are not designed to reduce or eliminate competition among wholesalers and which are not designed to maintain or increase prices to consumers, for a distiller's refusing to sell to a particular wholesaler. There are sound, legitimate business reasons for a distiller's desiring to distribute his brands through one, two or three wholesalers, but not through twenty, or thirty, or forty wholesalers.

At trial, evidence was produced to demonstrate existence of a number of situations where a licensed importer would be justified in refusing to deal with a Minnesota wholesaler and yet by the terms of C. 664, § 2, would be foreclosed from showing his justification for refusing to deal in defense against criminal prosecution or license forfeiture proceedings. (May 2, 1975 opinion, G.C. App. B, pp. A-43 - A-45; see especially Footnote 20, G.C. App. B, p. A-50) One example is the sale of a licensed importer's brand by a Minnesota whole-

saler at a below cost price "for the purpose or with the effect of injuring a competitor or destroying competition" in violation of M.S.A. § 325.01, et seq., the constitutionality of which was upheld in *McElhone v. Geror*, 207 Minn. 580, 292 N.W. 414 (1940), and which is commonly referred to as "footballing". (May 2, 1975 opinion, G.C. App. B, p. A-44) Thus, a licensed importer receiving an order from a Minnesota wholesaler for brands which the Minnesota wholesaler has consistently "footballed" at sales below cost for the purpose of injuring competitors or destroying competition could not refuse to fill such an order and would not be permitted to defend against criminal charges or license forfeiture proceedings on account of such refusal to deal.

In this circumstance, the licensed importer, if C. 664, § 2, is sustained as being constitutional, could be required to supply his branded merchandise to a wholesaler who systematically uses his merchandise to engage in criminal predatory and anti-competition sales activities.

Every witness for a distillery at the trial testified that no distiller would voluntarily enter into non-cancellable distributorships. (T. 482, 483, 532, 581) One of the basic rights of every manufacturer in granting distribution rights to a distributor is the right to terminate, based on inadequate performance. But despite all of this, C. 664, purportedly passed for the purpose of promoting competition and reducing prices, brushes aside all refusals to sell and goes far beyond the purported purposes of the statute.

C. 664 requires a licensed importer to sell his brands to all licensed wholesalers if the latter request the opportunity to purchase the importer's brands. However, as pointed out hereinabove, a distiller (licensed importer), for business reasons, may decide that his plan of distribution should be confined

to three or four wholesale distributors rather than to ten or twenty. The Act would not permit this. A licensed importer might decide that a particular wholesaler has a poor business record in promoting brands of other distributors and is not likely to contribute to the importer's success in enlarging distribution of his brand. Again, under C. 664 a licensed importer is not permitted to refuse to deal on that ground. A particular wholesaler may have an unsavory reputation, and an importer for that reason might prefer not to have his brand distributed by such a person. Under the Act he is denied that right. A wholesaler may be owned by another distiller, but yet despite an importer's desire to refuse to deal with such a wholesaler, the importer is denied that right under the Act. Many other instances may arise where a licensed importer, for reasons having nothing to do with predatory conduct, would prefer not to sell his product to a particular person or corporation.

The decision of the Minnesota Supreme Court in *Twin City Candy and Tobacco Co. v. A. Weisman Co.*, 276 Minn. 225, 149 N.W.2d 698 (1967), is directly in point in the instant case. There that Court recognized that a seller has a right to deal with his goods and that this freedom to contract may not be circumscribed except for compelling reasons.

The Court held that where a statute regulating the sale of cigarettes included within its prohibitions sales occurring without predatory intent or without harmful effect on legitimate competition, the statute denied due process and was invalid in its entirety.

Just as in *Weisman*, under C. 664, a licensed importer is afforded no opportunity to show that his refusal to offer his brands to a particular wholesaler will have no injurious effect on competition among wholesalers or on prices to consumers. No accommodation is made for the distiller who in good faith,

with no intent to curtail competition among wholesalers or to interfere with the reduction of prices to consumers, does not want to sell to a particular wholesaler, and whose refusal to sell has no effect on competition or prices. The distiller under the Act, as the seller in the *Weisman* case, is subject to criminal penalties for refusal to obey the statute, and his ability to show clearly innocent and legal reasons for noncompliance would be ineffective in the face of the statutory language. Thus, like the statute struck down in *Weisman*, C. 664 sweeps too broadly, including within its prohibition conduct both innocent and predatory.

In order for the State's regulation of the liquor industry to be sustained, the Legislature must take into account refusals to sell which fall outside the purported purposes of the regulation, and if the Legislature includes those kinds of refusals in its broad sweep and does not except them from the operation of the statute, then the statute is overly broad and must fall.

b. *Conclusive Presumptions.* In addition to this overbreadth analysis of C. 664, a still different perspective is given to the Act when it is analyzed in light of the doctrine of conclusive presumptions. The Trial Court found that the Legislature could reasonably determine that the Act would promote price competition and tend to lower prices to retail liquor dealers. (Findings of Fact 24, G.C. App. C, p. A-60)

The Act itself provides that every refusal to sell to wholesalers, except in response to a wholesaler's failure to make timely payment, is unlawful and a misdemeanor. Thus, the Act creates a conclusive presumption that every refusal to sell to a wholesaler is with the intent or effect of injuring competition or competitors.

This Court has dealt repeatedly with the doctrine of conclusive presumptions, and has found them to be invalid in a number of cases. In *Cleveland Board of Education v. LaFleur* 414 U.S. 632, 94 S. Ct. 791, 39 L. Ed. 2d 52 (1974), the United States Supreme Court held invalid rules of school boards requiring a pregnant schoolteacher to take unpaid maternity leave five months before the expected date of childbirth. The Court found a conclusive presumption—that women who were four months pregnant were physically unable to continue teaching, and that this termination date was necessary for the school board to achieve continuity of classroom instruction. The Court held that such presumption was not supported by fact, and that the refusal of the school boards to allow a pregnant teacher to make a showing of her physical capacity to continue teaching—the conclusiveness of the presumption—denied to the pregnant teacher due process rights.

In the *LaFleur* case, the Court noted a previous holding that "permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments." *Vlandis v. Kline*, 412 U.S. 441, 446, 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973). *Vlandis v. Kline* invalidated a Connecticut statute creating a conclusive presumption of nonresidency for the purpose of qualifying for lower tuition rates at the state university. The Court in *LaFleur*, 94 S. Ct. 791, 798, quoted the crucial language from *Vlandis v. Kline:*

> [I]t is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true in fact, and when the state has reasonable alternative means of making the crucial determination. (412 U.S. 441, 452)

Similarly, the Supreme Court in *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971), invalidated a provision of the Georgia Safety Responsibility Act which required an uninsured motorist to post security or lose his license following an accident, without providing any hearing on fault. In that case Georgia argued that the state need not provide a hearing on fault because fault and liability were irrelevant to the statute. The Court disagreed, and held that such a hearing was required. The Court stated that in "reviewing state action in this area . . . we look to substance, not to bare form, to determine whether constitutional minimums have been honored." (402 U.S. at 541, 91 S.Ct. at 1590) The Court looked at the entire statutory scheme, and determined that liability played a crucial role in the Act, and that the state could not deny consideration of that factor in the hearing.

See also the Supreme Court's decision in *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), in which the Court struck down a statute which had the effect of conclusively presuming an unwed father was incompetent to raise his children. The Court there stated:

> . . . [t]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general and the due process clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones. . . . Procedure by presumption is always cheaper and easier than individualized determinations. (At p. 1215)

Other cases in which the Court struck down such irrebuttable presumptions are *United States Department of Agriculture v. Murray*, 413 U.S. 508, 93 S.Ct. 2832, 37 L.Ed.2d 767 (1973); *Carrington v. Rash*, 380 U.S. 89 85 S.Ct. 775, 13 L.Ed.2d 675 (1965); *Heiner v. Donnan*, 285 U.S. 312, 52 S.Ct. 358, 76 L.Ed. 772 (1932); *Schlesinger v. Wisconsin*, 270 U.S. 230, 46 S.Ct. 260, 70 L.Ed. 557 (1926).

All of the above cases deal with statutes creating non-criminal penalties of one kind or another. C. 664, § 2 creates not only civil but criminal liability for its violation, and United States Supreme Court cases on presumptions in criminal cases illustrate the extreme reluctance with which courts approach such presumptions. In those criminal cases with which the court is dealing, the presumption is not even conclusive, but merely shifts the burden of proof to the defendant. Nevertheless, the court analyzes carefully whether there is any foundation in fact for a given presumption, and if it finds no such basis, the statutory presumption is declared to be invalid. See, for example, *Turner v. United States*, 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970); *Leary v. United States*, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 52 (1969); *Tot v. United States*, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943).

In the instant case, C. 664, § 2 makes any refusal to sell, except for payment arrearages, a violation of the statute and any violator subject to criminal and civil penalties, including license forfeiture. In order to see precisely how such a statute creates an invalid irrebuttable presumption, reference must be made to the permissible scope of state police power when regulating economic activities.

As the United States Supreme Court stated in *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 513, 44 S.Ct. 412, 413, 68 L.Ed. 813 (1924):

> . . . a state may not under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them. Lawton v. Steele, 152 U.S. 133, 137, 14 Sup.Ct. 499, 38 L.Ed. 385; Mayer v. Nebraska, 262 U.S. 390, 399, 43 Sup.Ct. 625, 67 L.Ed. 1042.

The Minnesota Supreme Court dealt with the question of conclusive presumptions in *Twin City Candy and Tobacco Co. v. A. Weisman Co.*, 276 Minn. 225, 149 N.W.2d 698 (1967). In that case, such a conclusive presumption was written into the preamble of the statute, although the body of the statute itself was silent with respect to whether sales must be made with intent or effect of injuring competition or competitors in order for it to constitute a violation of the statute. The Court stated that:

> . . . to the extent that the recitations in § 325.64 constitute a conclusive presumption, they are unjustified and invalid. . . . A law which closes a litigant's mouth in court is as bad as a law which deprives him of access to it. (149 N.W.2d 698, 702)

The Minnesota Court went on to quote the holding from the United States Supreme Court in *Tyson & Brother, etc. v. Banton*, 273 U.S. 418, 443, 47 S.Ct. 426, 432, 71 L.Ed. 718, 728 (1927):

> . . . It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrong-doers may also be caught.

The Minnesota Court expressed a similar view in the *Weisman* case, 276 Minn. 225, 149 N.W.2d 698 (1967), in which it stated:

> A basic assumption in considering this question is the premise that vendors have a right to deal with their property as they wish and that freedom to contract is a liberty which may not be circumscribed except for compelling reasons. (149 N.W.2d 698, 702)

The Court in that case held that in order to justify price-fixing under the state's police power, there must be a substantial relationship between the statutory measure and the evil to be suppressed.

Similarly, in the instant case, C. 664 is a substantial imposition of state power on the normal liberty of a vendor to deal with his property as he wishes, and there must be an equally substantial relationship between the measure and the evil to be suppressed. The Trial Court's findings of fact, as noted above, indicated that the Legislature could reasonably have determined that this measure would increase price competition and tend to lower costs to retail liquor dealers. The State has urged that this was the legitimate purpose of the Act.

The constitutional flaw, however, is in the lack of substantial relation between this "evil"—a supposed lack of price competition—and the measure itself. The Act is not limited to barring refusals to sell made with the intent or effect of injuring competition or competitors. Rather, it covers all refusals to sell except for payment arrearages, language virtualguaranteed to cover innocent, nonpredatory refusals to sell as well as those made with the intent or effect in injuring competition or competitors. The evidence at trial clearly indicated that licensed importers would have a number of innocent, non-

predatory reasons for refusing to deal with a particular wholesaler or group of wholesalers. (T. 227-28, 350, 400, 461, 468, 479, 480, 524-26, 530-31)

As the Minnesota Supreme Court held in the *Weisman* case, a statute attempting to conclusively presume that business actions are taken for predatory reasons must be struck down as unconstitutionally overbroad, for such statutes which proscribe innocent as well as injurious sales are not proper exercises of police power, have no reasonable relation to any evil which they should properly curb, and deny due process of law and equal protection of the laws.

This due process violation resulting from such irrebuttable presumptions is procedural rather than substantive, and does not require the court to relaunch an attack on economic statutes based on substantive due process. As the Minnesota Supreme Court states in *Weisman*:

> . . . to the extent the recitations in § 325.64 constitute a conclusive presumption, they are unjustified and invalid. Even the legislature does not have the power to declare conclusively what shall be evidence if it is contrary to fact. (149 N.W.2d 698, 702)

Similarly, the United States Supreme Court has held conclusive presumptions to be violations of procedural due process, because they deny a right to a hearing on a critical issue in each case. Thus, in *Heiner v. Donnan*, 285 U.S. 312, 52 S.Ct. 358, 76 L.Ed. 772 (1932), the Court held that the legislature was without power to enact a *rule of evidence* denying the litigant the right to prove the facts of his case, whether or not it was made in the guise of substantive law. In *Vlandis v. Kline*, 412 U.S. 441, 93 S.Ct. 2230, 2233, 37 L.Ed.2d 63 (1973), the Court noted that in its decision in *Bell v. Burson*, 402 U.S.

535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971), it had found the Georgia statute to be inconsistent with *procedural* due process.

Thus in the instant case, C. 664 creates an implied irrebuttable presumption, a presumption that every refusal to sell except for payment arrearages is made with the intent or effect of injuring competition or competitors. Under the clear authority of previous federal and state case law, such an irrebuttable presumption violates procedural due process.

The April 4 and May 2 opinions of the Minnesota Supreme Court demonstrate that Court's attempt—and failure—to grapple with that question. In its opinion of April 4, 1975, the Minnesota Court stated that its "analysis, we are satisfied, supports our conclusion that the presumption here employed may be necessarily true in fact. It is a determination peculiarly within the knowledge and experience of legislators." (G.C. App. A, p. A-25) However, the Court withdrew that opinion and substituted a new one on May 2, 1975. In that substituted opinion, it revised the language quoted above and stated merely that its

> analysis, we are satisfied, supports our conclusion that the act is constitutionally valid. To paraphrase the Hostetter court, and without intimating any limitation as to defenses which may be interposed in enforcement, we cannot say that the legislature acted unconstitutionally when it determined to abolish exclusive dealerships, ..." (G.C. App. B, A-51)

This language followed shortly after a revealing footnote in which the Minnesota Court acknowledged that a presumption contained in the statute would be invalid if it would foreclose a distiller charged with a violation from interposing a defense that his refusal to deal resulted not from predatory

discrimination but valid reasons. The Court assumed in that footnote that regulations would avoid such a presumption. (G.C. App. B, p. A-50, fn. 20)

Nevertheless, the Minnesota Court in that opinion recognized that the Legislature had, in fact, classified "all non-credit refusals to sell as discriminatory"—thus acknowledging the very conclusive presumption it sought to avoid in footnote 20. (G.C. App. B, p. A-49)

The opinion of the Minnesota Supreme Court, in its very attempt to avoid the issue of conclusive presumption, establishes that such a presumption is indeed contained in the statute.

C. Interference With Property Rights.

While the Minnesota Supreme Court has held in the past that selling intoxicating liquor for use as a beverage is a "mere privilege subject to the police power of the state," *Anderson v. City of St. Paul*, 226 Minn. 186, 32 N.W.2d 538, 541 (1948), the distinction between a right and a privilege is not constitutionally significant. In *Bell v. Burson*, 402 U.S. 535, 539, 91 S.Ct. 1586, 1589, 29 L.Ed.2d 90 (1971), the United States Supreme Court cited the "general proposition that relevant constitutional restraints limit state power to terminate entitlements whether the entitlement is denominated a 'right' or a 'privilege'." Similarly, this Court in *Graham v. Richardson*, 403 U.S. 365, 374, 91 S.Ct. 1848, 1853, 29 L.Ed.2d 534 (1971), rejected the theory that constitutional rights turn on whether a benefit was characterized as a "right" or "privilege"; and in *Hornsby v. Allen*, 326 F.2d 605, 609 (5th Cir. 1964), the Circuit Court of Appeals for the Fifth Circuit reached the same conclusion.

By virtue of the continuing relationship between wholesaler and licensed importer, by the promotion of individual brands by wholesalers, and by the regulatory and licensing scheme developed by the state, Minnesota liquor wholesalers have acquired certain property rights.

Evidence at trial clearly indicated that wholesalers have acted in reliance upon these rights in expending funds and efforts in promotion of individual brands. (T. 279-281) Over the years, they have spent money on items such as advertising, promotions, and salesman's incentives, creating a demand for certain brands of distilled spirits. (T. 279-281) Testimony at trial made it evident that while no contracts bind wholesalers and licensed importers to their present arrangement, licensed importers will continue to supply brands to wholesalers on an exclusive basis as long as the wholesaler continues to promote and distribute it. (T. 192, 572) Thus, wholesalers have acquired certain property rights in brands they have promoted and in the expectation of continuing to handle those brands.

In addition to these rights, wholesalers have a property right in the investment they have made in their business. If outside interference or action by the distiller destroys the distributorship and value of the accompanying investment, the wholesaler has a right to recoupment. In *Clausen and Sons, Inc. v. Theo. Hamm Brewing Co.*, 395 F.2d 388 (8th Cir. 1968), the Court stated the applicable rule:

> . . . under Minnesota law where an exclusive franchise dealer under an implied contract terminable on notice has at the instance of a manufacturer or supplier invested his resources and credit in establishment of a costly distribution facility for the supplier's product, and the supplier thereafter unreasonably terminates the contract and dealership without giving the dealer an opportunity to recoup his investment, a claim may be stated. (At p. 391)

Testimony at trial indicated that such recoupment has not occurred in certain cases, and that some wholesalers have seen no return on their promotion of certain brands of distilled spirits. (T. 139-140)

Trial testimony indicated that the value of these property rights will be destroyed by implementation of C. 664, § 2. (T. 245-247; 315-317) Testimony indicated that the value of the wholesaler's plant, sales force, brand promotion, and the distribution arrangements with distiller-importers will be destroyed. (T. 315-317; 371)

The Act will have severe effects upon the property rights which wholesalers have acquired in their business and upon their right to continue those businesses. Testimony of plaintiffs' witnesses at trial indicated the sweeping changes that enforcement of this Act would cause. If all distillers were forced to sell to all wholesalers, wholesalers would no longer have any interest in brand promotion through media advertising or their sales forces, since all competing wholesalers could take advantage of market demand created by the promotion. (T. 380-381) Wholesalers would become order takers, stockpiling selections of the most widely known brands, and promoting no brands. (T. 315-317; 430-433) Nationally known and advertised brands would be predominant, and numerous lesser known brands would be dropped by retailers and consumers once their promotion had stopped. Introduction of new brands would be extremely unlikely. (T. 430-432) Consumers thus would find themselves with increasingly smaller selection if C. 664 were put into effect. (T. 95-96; 109-110)

In addition, testimony also indicated that "footballing" of brands would occur—that prices on certain brands would be cut to use them as "loss leaders" in the sale of other brands. (T. 125; 527-528) Testimony indicated that this might initial-

ly increase sales of that brand, but would do it serious damage in the long run. (T. 95-96; 109)

Wholesale sales staffs would find their function limited to taking orders rather than educating retailers on brand use, promotion and introduction of new brands, and helping retailers select shelf space and put up displays. (T. 522-523) Sales staffs would be interested only in taking orders. Order-taking by phone would eventually eliminate even this role for the present sales staff. (T. 315-317; 522-523)

Wholesalers who had built up brands through media and sales force promotion would see their investment vanishing, as all wholesalers would have access to those brands.

In short, the enforcement of C. 664 would destroy the marketing arrangements developed over the years and create an entirely different marketing and distribution system.

Insofar as such destruction of property rights is arbitrary and unreasonable, it is a violation of property rights guaranteed under Federal and State Constitutions. The Act is an unreasonable and arbitrary exercise of police power. The full measure of such unreasonableness becomes apparent in examining the Act's equal protection implications.

D. Equal Protection Rights.

Both distillers and wholesalers of intoxicating liquors are protected by Federal and State Constitutional provisions from legislation or enforcement of legislation which arbitrarily and unreasonably classifies and discriminates against them. Any classification in legislation or enforcement thereof must be based on a reasonable, non-arbitrary basis.

The Act, through exempting from its reach licensed importers and wholesalers of *wines and malt beverages*, creates

arbitrary and unreasonable classifications to the detriment of licensed importers and wholesalers of distilled spirits in violation of both equal protection and class legislation rights. Testimony at trial indicated that wines and distilled spirits compete for shelf space and for the customer's dollar. (T. 359; 426-427; 530; 578; 595) Testimony indicated further that there are few, if any, distinctions between wines, malt beverages, and distilled spirits in the way in which they are distributed or marketed. The exemption in the Act for wines and malt beverages will create a competitive advantage for those two products over distilled spirits. (T. 530)

Certain trial testimony indicated that the real beneficiaries of the Act and the new marketing arrangement were not to be the Minnesota consumer, but the liquor *retailers*. (T. 477; 843) Legislation aimed at aiding this class at the expense of wholesalers, licensed importers, and the public constitutes class legislation, and violates the right of wholesalers and licensed importers to be protected from such special class legislation.

The Act specifically exempts from its reach wines and malt beverages regardless of their alcoholic content. Those licensed importers who deal exclusively in distilled spirits and do not deal in wines and malt beverages—Heaven Hill, Federal and Boston—contend that the exclusion from the law of dealers in wines and malt beverages creates an unreasonable classification which violates their rights to equal protection. In addition, those importers and wholesalers who deal in both distilled spirits and wines and malt beverages contend that as to their distilled liquor business, the arbitrary classification renders them unable to compete effectively in the intoxicating liquor market with importers and wholesalers who deal exclusively in wines and malt beverages.

Plaintiffs submit that the classifications in C. 664 discriminate between those engaged in the same calling and that such classifications have no reasonable basis. Although the trial testimony conflicted on the point, the great weight of the testimony indicated that there is little, if any, difference between the marketing, distribution and sale of distilled spirits and those of wines and malt beverages. (T. 173; 304-307; 471) The Trial Court found that

> . . . the Legislature could reasonably determine that the public interest did not require statutory provision for the open wholesaling of wines and beers at this time, due to differences in requirements for the sale of wines and beers, the absence of significant competition between wines and beers on the one hand and distilled spirits on the other hand, and the presence of a greater number of wholesalers selling wines and beers. (Findings of Fact 37, G. C. App. C, p. A-62).

However, the Trial Court also found that there is some competition between wines and beers versus distilled spirits, "especially with respect to floor space, shelf space, and consumer attention." (Finding 32, G. C. App. C p. A-61) The Trial Court also found that the "demand for wines is currently expanding greatly in Minnesota and throughout the country." (Finding 34 G. C. App. C. p. A-61) The Trial Court did not reach a finding on the question of the relative lack of growth in the distilled spirit market during the same period, although trial testimony indicated that such a relative lack of growth has in fact occurred. (T. 426-27, 731)

In view of the admitted competition between wines and beers on the one hand and distilled spirits on the other, of the recent tremendous growth in the use of wines, and of the lack

of growth in the distilled spirit market, the nature and effects of this arbitrary classification become clear. Under the Act, wine wholesalers continue to promote brands of wine available exclusively through them, whereas distilled spirits wholesalers will no longer have incentives for brand promotion. Promotion of a brand on the state and local level is crucial for success in the intoxicating liquor business, and only through brand promotion can individual brands achieve and retain market demand. (T. 106; 330) Yet such brand promotion will no longer be feasible for distilled spirit wholesalers. Salesmen promoting shelf space, floor space and advertising will be those of only wine wholesalers.

Thus, in the traditional competitive fight for shelf space, floor space, and the consumer's dollar, only the wine and beer wholesaler will have the facilities and incentive to continue these efforts. Those who wholesale only distilled spirits, or those who manufacture and import only distilled spirits, will be at a competitive disadvantage because of the classifications made by the Act.

Thus, because the Act exempts from its reach wines and beers, regardless of alcoholic content, and regardless of the fact that these intoxicating liquors compete for the consumer's dollar against distilled spirits, the Act violates the equal protection clauses of the Federal and State Constitutions.

E. A Standard of Reasonableness.

Whatever the scope of the Twenty-first Amendment, the state and federal cases set out above indicate clearly that constitutional guarantees of due process and equal protection are available to appellants in this case. In order to determine the question of constitutionality, appellants and appellees in this suit must meet head-on the issues created when individual rights conflict with state police power.

The traditional test employed in such analysis goes to the question of whether the statute is arbitrary and unreasonable.

Appellants in this case recognize that under the police power a state may legislate to promote the public health, safety, morals and welfare of its citizens, and that included therein is the power to further the economic welfare of the people.

But a recognition of these principles carries with it a like recognition that the police power of the state, even with respect to the regulation of the liquor industry, is not unlimited. Not only must regulatory legislation have a valid police power purpose, but equally, if not more, important the legislation must have a reasonable relation to that purpose.

If a statute is overbroad and goes beyond proper police power purposes, and if in addition, it clashes with rights protected by the Fourteenth Amendment to the Federal Constitution, then the statute must fall. See *Burns Baking Co. v. Bryan*, 264 U.S. 504, 44 S.Ct. 412, 413, 68 L.Ed. 813 (1924), where the Court stated:

> But a state may not, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them. (At p. 413)

In brief, the issues between appellants and appellees center not on the scope of the Twenty-first Amendment, nor on the scope of police power, for it is clear that these are limited by what is reasonable and non-arbitrary. Rather, the issue to be squarely faced is whether this particular statute, under all the facts, is in fact unreasonable and arbitrary.

Plaintiffs have clearly demonstrated above that C. 664 is unreasonable and arbitrary because it does not have a reasonable relation to the purported purpose for which it was en-

acted. It makes all refusals to sell to wholesalers unlawful. It is overbroad; it goes far beyond the claimed purposes of promoting competition and effecting price reductions to consumers. The statute cannot withstand the test of not arbitrarily interfering with constitutionally guaranteed rights.

F. Unconstitutional Delegation and Vagueness.

C. 664, §2, as construed by the Minnesota Supreme Court both delegates excessive authority to an administrative agency and is rendered unconstitutionally vague.

In footnote 20 of its opinion of May 20, 1975, the Minnesota Supreme Court delegates certain decisions to the Minnesota Liquor Commission. The Court stated:

> Any enforcement of the act by regulations which would imply an irrebuttable presumption is constitutionally offensive to due process . . . . and will, we assume, be avoided. (G.C. App. B, p. A-50)

The Court so stated this legislative delegation despite the clear language of C. 664 which allows for *no* exceptions to its mandate.

In addition, because C. 664, read with Section 340.19, is a criminal as well as civil statute, this delegation confers the power of adjudication of guilt or innocence in criminal matters to an administrative agency. Such delegations have not been allowed by this Court in cases such as *Helvering v. Mitchell*, 303 U.S. 391, 402, 58 S.Ct. 630, 634, 82 L.Ed. 917 (1938); and *L. P. Stewart & Bro., Inc. v. Bowles*, 322 U.S. 398, 64 S.Ct. 1097, 88 L.Ed. 1350 (1944).

By its delegation of authority in matters involving criminal liability, the Minnesota Supreme Court has injected a vagueness into C. 664 which leaves it constitutionally deficient.

The Minnesota Supreme Court has delegated to the Liquor Control Commission the responsibility of drawing up regulations and enforcing C. 664, §2 in such a way that will not deny the due process rights of appellants and others. In so doing, the Court rendered the statute vague, providing no notice or warning to appellants and others of what conduct would be proscribed by the statute. As this Court stated in *Smith v. Goguen*, 415 U.S. 566, 572 n. 8, 94 S.Ct. 1242, 39 L.Ed.2d 605, (1974),

> . . . [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

C. 664, §2 was clear on its face—but as written contained the constitutional defects of overbreadth and erroneous conclusive presumptions. In attempting to construe the Act to be constitutional, the Minnesota Supreme Court injected uncertainty into the statute, leaving it so vague as to serve as inadequate notice of conduct proscribed.

G. General Importance of Questions.

Once it is clear that C. 664, §2, is a nontemperance statute and that it applies only to a licensed importer in respect of its activities after the importation of its products has occurred pursuant to a previously issued importer's license, thereby making the Twenty-first Amendment irrevelant, we can then evaluate the true dimensions of the constitutional problems here involved.

On the one hand, C. 664, §2, compels a licensed importer to make its products available to all wholesalers who desire them and on the other hand totally deprives the licensed importer of any right to confine the sale of its product to any extent. Compelled availability to wholesalers is applicable in respect of the branded products of a licensed importer even though equivalents thereof are available in the market and in competition with the licensed importer's brands. All of this is accomplished by means of the conclusive presumption that every refusal to deal is unlawful and ground for license termination except for payment arrearages on past purchases.

If we but apply such a conclusive presumption to manufacturers of automobiles, bicycles, refrigerators, perfumes and hundreds of other products distributed by them to various types of confined distribution systems, we see the enormous and widespread importance of the question here involved. *Schwinn*, supra. reiterates the long recognized rule, that a manufacturer of a branded item in competition with equivalents thereof in the market, may confine distribution of his branded product to one or more distributors as he chooses. This is not only the accepted rule of antitrust law, but is also a recognition of the basic property right of a manufacturer to sell and dispose of his property to buyers of his choice.

C. 664, § 2, by means of a conclusive presumption attempts to destroy by legislation that basic right of a manufacturer to confine distribution of his branded products which compete in the market with equivalents. To uphold the constitutionality of such a conclusive presumption against the challenge of lack of procedural due process is to give the signal of validity to similar statutory schemes applied to products other than liquor. Whatever the correct social policy may be toward dis-

tilled spirits in an appropriate case, such policy is not here involved. A precedent based on special treatment of a deleterious product where the deleterious quality thereof is not involved, can create bad constitutional law as applied to nondeleterious products. Such a precedent can have far reaching and adverse consequences and the importance of assuming jurisdiction of this question is therefore evident.

VII. CONCLUSION

For all of the reasons herein given this Court should accept jurisdiction of this appeal.

Respectfully submitted,

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APPENDIX

STATE OF MINNESOTA
IN SUPREME COURT

No. 44831 No. 44837 No. 44844

Federal Distillers, Inc., Mr. Boston Distiller Corporation, and Johnson Brothers Wholesale Liquor Company,
Plaintiffs-Appellants-Respondents,

vs.

Joseph Novak, Liquor Control Commissioner of Minnesota, and the State of Minnesota,
Defendants-Respondents,

and

Ed. Phillips & Sons Co. and Griggs, Cooper & Co., Inc.,
Intervenors-Appellants-Respondents,

and

Raymond Distributing Company, Inc.,
Intervenor-Respondent

No. 44832

Old Peoria Company, Inc.,
Plaintiff-Appellant,

vs.

Joseph Novak, Liquor Control Commissioner of Minnesota,
Defendant-Respondent.

No. 44833

Heaven Hill Distilleries, Inc.,

Plaintiff-Appellant,

vs.

Joseph Novak, Liquor Control Commissioner of Minnesota,

Defendant-Respondent.

No. 44834

National Distillers & Chemical Corporation,

Plaintiff-Appellant,

vs.

Joseph Novak, Liquor Control Commissioner of Minnesota,

Defendant-Respondent.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Ed. Phillips & Sons Co., appellant in Nos. 44831, 44837 and 44844; Old Peoria Company, Inc., appellant in No. 44832; Heaven Hill Distilleries, Inc., appellant in No. 44833; and National Distillers & Chemical Corporation, appellant in No. 44834, jointly and severally, appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Minnesota entered in these actions on June 3, 1975, affirming the Order of the Honorable Harold W. Schultz dated January 4,

1974, denying the motion of appellants for amended findings or in the alternative, for a new trial.

These appeals are taken pursuant to 28 U.S.C. §1257 (2).

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(Filed June 3, 1975)